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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

RANDALL J. GIBAS,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS - SECOND JUDICIAL DISTRICT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED

1. Were petitioner's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution violated when it was found by the trial court that the Wisconsin Department of Justice: (1) submitted correspondences to the district attorney's office; (2) conferred with prospective witnesses; (3) handicapped or hindered prospective witnesses; and (4), exerted influence on the prosecution of the case?

2. Were the defendant's constitutional due process rights violated by government misconduct to such an extent that dismissal of the case with prejudice was the proper remedy?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Randall Gibas, respectfully prays that a Writ of Certiorari issue to review the judgment of the Wisconsin Court of Appeals, Second Judicial District, entered in the above-entitled proceeding, on April 27, 1994.

OPINION BELOW

The opinion of the Wisconsin Court of Appeals, Second Judicial District, appears at 184 Wis. 2d 355 (2nd Dist. 1994). A copy of the opinion is attached to this Petition as Exhibit "A".

The Order of the Supreme Court of Wisconsin denying Petition for Review, entered July 19, 1994, is not reported and attached as Exhibit "B".

JURISDICTION

The judgment of the Wisconsin Court of Appeals, Second Judicial District, was entered on April 27, 1994 (Appendix "A"). The Wisconsin Supreme Court denied a timely Petition for Review on July 19, 1994. This Petition is being filed within ninety (90) days of the Wisconsin Supreme Court's denial of review. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall...be deprived of life, liberty, or property, without due process of law....

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor....

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall make or enforce any law which shall...deprive any person of life, liberty, or property, without due process of law....

STATUTES INVOLVED

Wisconsin statute section 940.21 (1)(c) provides in pertinent part:

> (1) Whoever does any of the following is guilty of a Class A Misdemeanor...
>
> (c) Intentionally points a firearm at or toward another...

Wisconsin statute section 940.42 provides in pertinent part:

> ...Whoever knowingly and maliciously prevents or dissuades, or attempts to so prevent or dissuade any witness from attending or giving testimony at any trial, proceeding, or inquiry authorized by law, is guilty of a Class A Misdemeanor.

Wisconsin statute section 940.41 (1) provides in pertinent part:

> "Maliciously" means an intent to vex, annoy, or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

Wisconsin statute section 940.42 provides in pertinent part:

> Whoever violates section 940.42 under any of the following circumstances is guilty of a Class D Felony:
>
> (1) the act is accomplished by force or violence or attempted force or violence....
>
> (2) where the act is accompanied by injury or damage to the real or personal property of any person....
>
> (3) where the act is accompanied by any express or implied threat of force, violence, injury, or damage....
>
> (4) where the accuser is in furtherance of any conspiracy....
>
> (5) where the act is committed by any person who has suffered any prior

> conviction for any violation under this statute under [this statute]...or
>
> (6) where the act is committed by any person for monetary gain or for any other consideration acted on the request of any other person.

STATEMENT OF THE CASE

Petitioner, Randall J. Gibas, a Special Agent with the Wisconsin Division of Narcotics Enforcement, was charged in Calumet County Circuit Court with intentionally pointing a firearm at or toward another, contrary to Wisconsin Statute § 940.21 (1)(c). The Petitioner made an initial appearance in Calumet County Circuit Court on February 10, 1992, and entered a plea of not guilty.

This incident allegedly occurred when Mr. Gibas, a Wisconsin Department of Justice ("DOJ") Narcotics' Agent, was on a surveillance operation with a female agent, Lori A. Sasse. Mr. Gibas allegedly pointed his revolver at Ms. Sasse while they were both in a vehicle during a stakeout. Ms. Sasse reported the incident on

October 1, 1991, when she was interviewed by Richard Anderson, Director of the Division of Narcotics Enforcement, Wisconsin Department of Justice, and Special Agent in Charge, Ronald H. Ninneman.

On April 28, 1993, counsel for the petitioner filed a motion to dismiss alleging that his Due Process Rights under the Fourteenth Amendment to the United States Constitution had been violated, based partly upon governmental misconduct by the Calumet County District Attorney's office and the Wisconsin Department of Justice. Specifically, Mr. Gibas claimed that the State was guilty of outrageous governmental conduct in that the (1) Department of Justice (DOJ) directed the district attorney to file the Complaint; (2) a DOJ supervisor threatened Mr. Gibas's fellow workers with reprisals if they either helped Mr. Gibas prepare his case or testify as witnesses on his behalf; and (3), the DOJ and the district attorney were in continuous conduct even after

the Complaint was issued. This motion was heard before the Honorable John W. Mickiewicz, Fond du Lac Circuit Judge, who had been specifically assigned to hear the Calumet County criminal case against Mr. Gibas. The motion hearing was held on May 18, 1993, at the Fond du Lac County Courthouse.

The crux of petitioner's contention that his constitutional Due Process Rights were violated resolved around the issue of the approach and intimidation of witnesses by the DOJ. At the motion hearing, the following are some of the facts that were brought forth establishing an overall intimidation of defense witnesses.

On January 29, 1992, Attorney Jacqueline Schellinger, the petitioner's first defense attorney, sent to Donald Poppy, the then District Attorney of Calumet County, a letter outlining the witnesses who could collaborate the credibility regarding the government's witness, Lori Sasse. Those witnesses included

Gary Martine, Byron Paape, Mike Myszewski, Karen Aspland, and William Lamb.

During late January, 1992, or early February, 1992, Richard Larsen, Director of Division of Narcotics Enforcement (DNE), Wisconsin Department of Justice, approached witness Myszewski regarding the current criminal charges against Mr. Gibas. Mr. Myszewski advised Mr. Larsen that he, along with several other special agents of the Department of Justice, would be testifying on Mr. Gibas's behalf. At this time, Mr. Larsen attempted to discourage Mr. Myszewski from testifying on Mr. Gibas's behalf and further stated, "<u>management around here has long memories</u>."

During January, 1992, Gary Hamblin, acting head of the Wisconsin Division of Narcotics Enforcement, approached witness Martine while at the Division of the Narcotics Enforcement Headquarters, located in Madison, Wisconsin. During this conversation, Mr. Martine attempted to advise Mr. Hamblin of Mr. Gibas's character

while working for the Department of Justice. Mr. Hamblin advised Mr. Martine that Eugene Williams, the Director of the DNE, did not like Mr. Gibas and that there was "no love loss between Williams and Gibas."

During late January, 1992, Mr. Martine was again approached, but this time by Richard Larsen, the Director of the DNE. The conversation was related to Mr. Gibas's criminal charge and potential administrative charges. Mr. Martine advised Mr. Larsen that Mr. Gibas said that he was innocent of the criminal charge, that Mr. Gibas would not plead out, and that Mr. Gibas wasn't going to "take this matter lying down." Director Larsen then stated "Gibas will eventually run out of money. But the State never will." Mr. Martine said that he "took that as food for thought" and further stated:

> I knew what Gibas is. I knew what kind of agent (Gibas was). I guess I realize that if it could happen to Randy, it could happen to me, if that's the way the Department of Justice handles matters. If they put you in a position where guilt or innocence doesn't make any

difference, if it was just a matter of who had the most money, I guess I was in jeopardy as well.

During March, 1992, Special Agent Byron Paape, while attempting to assist Mr. Gibas in obtaining materials in Mr. Gibas's defense, was verbally reprimanded by Mr. Hamblin. Mr. Hamblin informed Mr. Paape that any further assistance would result in "disciplinary hearing or action". Mr. Paape interpreted that statement as a warning that if he wished to continue to advance in the Division, he would have to cease assisting Gibas. On March 8th or March 12th, 1992, Mr. Larsen, the Director of the DNE, approached Mr. Paape at the DNE office. Mr. Larsen verbally reprimanded Mr. Paape for assisting Mr. Gibas and swore at him, "if you want to go work for the fuckin public defender's office then go ahead."

At the motion to dismiss hearing, witness Lamb stated that he was intimidated by Special Agent in Charge, Richard Ninneman when Mr. Ninneman interviewed Mr. Lamb in conjunction

with Mr. Gibas's criminal and internal affairs investigation. Mr. Lamb further stated that Mr. Ninneman and Richard Anderson, the Administrative Director of the Division of Narcotics Enforcement, Wisconsin Department of Justice, informed him that it was a "no-no" to contact or assist Mr. Gibas. As a result, Mr. Lamb informed Mr. Gibas that he did not wish to speak with Mr. Gibas's attorney.

In an affidavit submitted to the court along with the motion to dismiss, Attorney Eric Erdmann, then counsel for petitioner, asserted that on August 25, 1992, at approximately 6:57 p.m., he telephoned complaining witness Lori Sasse. At that time, he advised Ms. Sasse that he was representing Mr. Gibas in the upcoming criminal matter and that he wished to talk to her about the situation. Attorney Erdmann further advised her that she did not have to talk to him. Ms. Sasse stated, "that she had been advised not to." Attorney Erdmann then asked Ms. Sasse who advised her not to, at which

time Ms. Sasse stated that she, "was advised while she worked at MEG (Lake Winnebago Metropolitan Enforcement Group) Unit not to talk to you". Attorney Erdmann asked if it was by her supervisors and Ms. Sasse said, "yes."

At the conclusion of the motion hearing, Judge John W. Mickiewicz dismissed this case against the petitioner, Randall J. Gibas, with prejudice, and entered a written order of dismissal on June 7, 1993. Judge Mickiewicz specifically held that during the course of prosecution of this case, the DOJ had:

> an independent problem and agenda of its own concerning the employment of Mr. Gibas that there continued involvement, with respect to submitting correspondence to the District Attorney's office, conferring with prospective witnesses, handicapping or hindering prospective witnesses and exerting influence on the prosecution of this case, subsequent to that independent charging document generally influencing the case, it unlawfully taints the prosecution.

As a result, the trial court held that Mr. Gibas's due process rights were violated and dismissed this case with prejudice.

On July 20, 1993, the State of Wisconsin appealed the order dismissing the criminal prosecution to the Wisconsin Court of Appeals. The petitioner filed a timely brief alleging that his federal Constitutional Due Process Rights were violated by outrageous governmental conduct. On April 27, 1994, the Wisconsin Court of Appeals reversed the trial court's holding and remanded the case back to the trial court with directions. Specifically, the Honorable Richard S. Brown in his opinion for the court held that, "although Gibas had alleged a specific violation of his due process rights, his defense fails because the State's conduct was not enmeshed in criminal activity." Additionally, the Court of Appeals held that although the actions by the DOJ were "troubling", and "not commendable", "[t]he state did not create nor was it involved in the incident which led to the charges against Gibas." In essence, the Wisconsin Court of Appeals has held that in order to establish the

defense of outrageous governmental conduct, the defendant must show that the government instigated the crime which led to the original charges against the defendant.

On May 24, 1994, petitioner timely filed a Petition to Review the Court of Appeals' decision with the Supreme Court of Wisconsin again alleging that his federal Constitutional Due Process Rights were violated. On July 19, 1994, the Supreme Court denied review of this matter.

REASON FOR GRANTING OF WRIT

I. PETITIONER'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY PERSISTENT, SUBTLE, ORGANIZED, AND DELIBERATE OUTRAGEOUS GOVERNMENTAL CONDUCT THAT CONTINUED OVER THE ENTIRE CRIMINAL PROCESS

A. The Defense Of Outrageous Governmental Conduct Has Been Recognized As A Bar From Invoking Judicial Processes To Obtain A Conviction Pursuant To Constitutional Due Process Principles.

The issue in this case is of fundamental importance to the conduct of legitimate

investigations into criminal activity. The defense of outrageous governmental conduct was first recognized by the Supreme Court in United States v. Russell, 411 U.S. 423 (1973). Although the specific issue in that case involved entrapment, the court noted that "we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction....", Russell, 411 U.S. at 431-432. Although specific grounds for applying such a defense were not outlined in Russell, the court did note that the outrageous governmental conduct defense may apply when law enforcement conduct is violating that "fundamental fairness, shocking to the universal sense of justice, mandated by the due process clause of the Fifth Amendment", Russell, 411 U.S. at 432.

Federal circuit courts have further recognized the validity of the outrageous

governmental conduct defense. United States v. Harris, 997 F.2d 812 (10th Cir. 1993). In some instances, those courts have even set aside convictions based upon the improper conduct of government officials. In United States v. Twigg, 588 F.2d 373 (3rd Circuit 1978), the court reversed a defendant's conviction on charges stemming from the manufacturer of "Speed" because the conduct of the government violated "fundamental fairness". Id. at 381-82. The court reasoned that the government's conduct was outrageous because the nature and extent of police involvement in criminal activity was so overreaching as to bar prosecution of defendants as a matter of due process.

Likewise, in Greene v. United States, 454 F.2d 783 (9th Cir. 1971), the court reversed the defendant's convictions on charges involving possession of unregistered distilling apparatus, sale without stamp of distill spirits, and conspiracy. The court implicitly found the defense of outrageous governmental conduct

applied to the defendants because the government involved itself so directly and continuously over a long period of time in the creation and maintenance of criminal operations. Clearly, federal courts have repeatedly recognized and upheld the defense of outrageous governmental conduct as a bar from invoking judicial processes to obtain conviction pursuant to constitutional due process principles.

B. Under The Concept Of Due Process Of Law, Fundamental Fairness Requires That A Criminal Defendant Be Guaranteed Certain Rights In Order To Preserve The Integrity Of The Judicial Process.

Although the concept of due process is somewhat nebulous and precludes defining, to say that there are no definite lines that can be crossed is a fallacy. In a criminal context, a defendant has "the right to be tried according to the fundamental, contemporary norms of civilized procedure"; Nicholas v. Gagnon, 710 F.2d 1267, 1275 (7th Cir. 1983) (citing Polko v. Connecticut, 302 U.S. 319 (1937)). A defendant

also has a "fundamental right to a fair opportunity to defend against the charges brought against him." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). Encompassed in this "fair opportunity" which is the very essence of due process, is the right to call witnesses on one's behalf, the right to examine adverse witnesses and the right to the assistance of counsel. Id. Due process guarantees the accused a fair trial, and any violation of fundamental fairness will constitute denial of that guarantee. A defendant is denied fundamental fairness when evidence material to guilt or innocence is unavailable. In short, due process of law rests upon the concepts of fundamental fairness and fair play. Thus, "convictions cannot be brought about by methods that offend the sense of justice." Rochin v. California, 342 U.S. 165, 173 (1952).

Due process guarantees the aforementioned rights because they are necessary for the preservation of the integrity of the judicial

process. It is not only the responsibility of the court to remain stalwart in its inherence to due process requirements, but it is also the prosecutor's responsibility to adhere to due process demands.

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as obligation to govern at all; and whose interest, therefore, in a criminal prosecution, is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law. The two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he shall do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It as much his duty to refrain from improper methods calculated produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Berger v. United States, 295 U.S. 78 (1935).

Though in the instant case, we are dealing with a state district attorney, the demands under the due process clause of the fourteenth amendment are no different.

From its very inception, the prosecution in this case has been so tainted and pervasive as to violate Mr. Gibas's due process rights. There have been delays in discovery, delays in prosecution, and witness intimidation. Indeed, the whole integrity of the judicial process has been called into question. In dismissing this case at the trial court level, Judge Mickiewicz specifically held that the district attorney's office conferred with prospective witnesses, handicapped or hindered prospective witnesses and exerted influence on the prosecution of the case which unlawfully tainted the prosecution. Clearly, the prosecution of Mr. Gibas has been shown to violate fundamental fairness, which is shocking to the universal sense of justice mandated by the due process clause of the fifth and Fourteenth amendment.

C. **Even If A Defendant Must Establish That The Government's Conduct Was Enmeshed In Criminal Activity Prior To Asserting The Defense Of Outrageous Governmental Conduct, The Intimidation Of Defense Witnesses By The Government Enmeshes The State In Criminal Activity.**

The Wisconsin Court of Appeals, in overturning the trial court's decision to dismiss this case with prejudice, has held that in order to establish the defense of outrageous governmental conduct, the defendant must show that the government's conduct was "enmeshed" in criminal activity. The court has determined that criminality on the part of the government is a condition precedent to use of this defense. This criminality requirement, however, has never been set forth by any federal court. As stated, an outrageous governmental conduct defense simply requires that the prosecution of a defendant violate "fundamental fairness, shocking to the universal sense of justice, mandated by the due process clause of the fifth amendment." Russell, 411 U.S. at 432. Questions regarding the application of the outrageous governmental conduct defense must be settled by the United States Supreme Court. The genesis of the concept of outrageous governmental conduct is found in the Due Process

Clause of the Fifth Amendment of the United States Constitution and the Wisconsin Court of Appeals' decision on this fundamental question of federal constitutional law runs counter to federal circuit court and United States Supreme Court decisions.

Even if a defendant must establish that the government's conduct was enmeshed in criminal activity prior to asserting the defense of outrageous governmental conduct, the intimidation of defense witnesses by the government enmeshes the State in criminal activity. The Wisconsin Court of Appeals has conceded that the defendant has alleged specific violations of his Due Process Rights. In overturning the dismissal, however, the court erroneously held that although the DOJ: (1) submitted correspondence to the district attorney's office; (2) conferred with prospective witnesses; (3) handicapped or hindered prospective witnesses; and (4), exerted influence on the prosecution of the case, none

of these constitutional violations involved the government in criminal operations. Specifically, the court held that although the actions by the DOJ were "troubling and not commendable", they did not "enmesh the state in criminal activity". Wisconsin statutes, however, specifically provide that, whoever knowingly and maliciously prevents or dissuades or who attempts to so prevent and dissuade any witness from attending or giving testimony in any trial, proceeding, or inquiry authorized by law is guilty of a Class A Misdemeanor; § 940.42, Wis. Stats. "Maliciously" has been defined as an intent to vex, annoy, or injure in any way another person or to thwart or interfere in any manner with the ordinary administration of justice; § 940.41 (1), Wis. Stats. Furthermore, Wisconsin Statute § 940.43, punishes the same offense as a Class D Felony where:

> (1) the act is accomplished by force or violence or attempted force or violence....

> (2) where the act is accompanied by injury or damage to the real or personal property of any person....
>
> (3) where the act is accompanied by any express or implied threat of force, violence, injury, or damage....
>
> (4) where the accuser is in furtherance of any conspiracy...
>
> (5) where the act is committed by any person who has suffered any prior conviction for any violation under this statute under [this statute]...or
>
> (6) where the act is committed by any person for monetary gain or for any other consideration acted on the request of any other person.

Included in the outrageous governmental conduct alleged by the defense in this case is the intimidation of prospective defense witnesses. Specifically, a prospective defense witness at the DOJ was cautioned not to testify for Mr. Gibas because "management [at the DOJ] has long memories." Another prospective defense witness was reprimanded for assisting Mr. Gibas during company time. Additionally, another prospective defense witness indicated that he

felt intimidated by a DOJ employee.

Since the DOJ knowingly and maliciously prevented or dissuaded, or attempted to prevent or dissuade witnesses from attending or giving testimony at the trial, such governmental conduct enmeshes the state in criminal activity. As such, the prosecution of the defendant is repugnant to the American criminal justice system and in violation of the defendant's constitutional due process rights.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CHOOSING DISMISSAL WITH PREJUDICE AS A REMEDY

The remedy chosen by the trial court in this case was dismissal with prejudice. Since the defense of outrageous governmental conduct has rarely been applied, the available remedies have never been specifically established. Common sense, however, seems to indicate that the suppression of evidence is not an appropriate remedy in that the mere admonishment to the DOJ and the district attorney's office to refrain from "inappropriate" behavior would not

remedy the situation. The trial court, therefore, had two choices. Either dismissal of the case or continuance of the prosecution. A continuance would only delay a tainted process still suffering the effects of the misconduct. To suppress the testimony of the defense witness would be to suppress vital evidence to the defense. Moreover, the harm done cannot be rectified by simply stating that such outrageous conduct should seize and desist and that the prosecution should proceed from this point on. Continuing the trial is an end which the outrageous governmental conduct was meant to obtain: prosecution and conviction of the defendant. In light of these circumstances, the trial court chose the only possible solution when it dismissed the case with prejudice.

The Court of Appeals in overturning this dismissal has, in essence, held that a defendant has no recourse when the government intimidates witnesses to the point that the defendant's right to present a defense is compromised.

Review by the United States Supreme Court is, therefore, necessary so as to establish a policy regarding the appropriate remedies when the government intimidates witnesses to a point that the defendant's rights to present a defense is compromised.

CONCLUSION

The important question raised by this case is whether the Wisconsin Court of Appeals is properly reading the Russell decision. The court's decision in this case is in direct conflict with Russell in establishing that criminality on the part of the government is a condition precedent to using the defense of outrageous governmental conduct. The effect of this holding by the Court of Appeals establishes that anything is permissible in law enforcement as long as the State is not "enmeshed" in criminal activity. This holding clearly goes beyond anything the court intended in Russell, is not consistent with the rational behind Russell, is in direct conflict with recent

federal circuit court decisions and for those reasons should be reviewed by this court.

Mr. Gibas's constitutional due process rights were violated by outrageous governmental conduct that was persistent, subtle, organized, and deliberate and which continued over the entire criminal investigatory process. Because this case deals with a decision by the Wisconsin Court of Appeals on an important question of federal law which has not been, but should be settled by this Court, review by the United States Supreme Court is appropriate. For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Wisconsin Court of Appeals, Second Judicial District.

Dated this 17 day of October, 1994.

Respectfully submitted,

Neal C. Schellinger,
Counsel of Record

Douglas W. Lehrer,
Counsel of Petitioner

APPENDIX "A"

STATE of Wisconsin, Plaintiff-Appellant,

v.

Randall J. GIBAS, Defendant-Respondent.†

Court of Appeals

No. 93-1951-CR. Submitted on briefs March 8, 1994.—Decided April 27, 1994.

(Also reported in — N.W.2d —.)

1. **Criminal Law and Procedure § 769*—defenses—outrageous governmental conduct—review.**

In Wisconsin, it appears that standard of review for defense of outrageous governmental conduct is de novo.

2. **Criminal Law and Procedure § 30.50*—defenses—outrageous governmental conduct—standard.**

In Wisconsin, in order to establish defense of outrageous governmental conduct it appears that defendant must assert that state violated specific constitutional right, and government's conduct must be so enmeshed in criminal activity that prosecution of defendant would be repugnant to American Criminal Justice System.

3. **Criminal Law and Procedure § 30.50*—defenses—outrageous governmental conduct—prosecution.**

In prosecution for charges of aiming and pointing weapon, where defendant was Wisconsin Department of Justice (DOJ) agent on stakeout with female agent, and allegedly pointed revolver at female agent while in stakeout car and ordered female agent to remove her clothes, and DOJ forwarded information to county sheriff's department, which

†Petition to review filed.

*See Callaghan's Wisconsin Digest, same topic and section number.

did its own investigation and, based upon that information and information supplied by DOJ, district attorney decided to charge defendant with aiming and pointing weapon, court of appeals found that although defendant had alleged specific violation of due process rights, defendant's defense failed because state's conduct was not enmeshed in criminal activity, as it appears that outrageous governmental conduct defense in Wisconsin requires defendant assert state violated specific constitutional right and government's conduct must be so enmeshed in criminal activity prosecution of defendant would be repugnant to American Criminal Justice System, and while trial court found violation of due process because DOJ submitted correspondence to district attorney's office, conferred with prospective witnesses, handicapped or hindered prospective witnesses, and exerted influence on prosecution of case, none of those reasons involved government in criminal operations, and court noted state did not create nor was it involved in incident which led to charges against defendant.

4. **Criminal Law and Procedure § 467*—witness testimony—right to obtain—prosecutorial interference.**

If government arbitrarily prevents defendant from presenting witness' testimony, defendant's Sixth Amendment right to have compulsory process for obtaining witnesses in his or her favor may be violated.

5. **Criminal Law and Procedure § 437*—suppression of evidence—prosecution—defendant's due process rights.**

Suppression by prosecution of evidence favorable to accused violates due process where evidence is material either to guilt or to punishment, regardless of good faith or bad faith of prosecution.

6. **Criminal Law and Procedure § 437*—suppression of evidence—prosecution—defendant's due process rights—prejudice.**

*See Callaghan's Wisconsin Digest, same topic and section number.

In appeal by Wisconsin Department of Justice (DOJ) agent for charges of aiming and pointing weapon at female agent and ordering female agent to remove clothes while on stakeout, and where prospective defense witness at DOJ was cautioned not to get involved in testifying for defendant, another prospective defense witness was reprimanded for assisting defendant during company time, and another prospective defense witness indicated he felt intimidated by DOJ employee, court concluded that defendant's right to put on defense was not violated because there was no prejudice established against him, as court acknowledged that although defendant had never raised argument of suppression by prosecution of evidence favorable to accused either in trial court or court of appeals, court could affirm for reasons other than those announced by trial court, and court of appeals found there was no showing by defendant that any prospective defense witnesses would have been prevented from testifying at trial and that tactics used by DOJ did not prejudice defendant, and thus, court noted that remedy was new trial, not dismissal of charges with prejudice.

APPEAL from an order of the circuit court for Calumet County: JOHN W. MICKIEWICZ, Judge. *Reversed and cause remanded with directions.*

On behalf of the plaintiff-appellant, the cause was submitted on the briefs of *Kenneth R. Kratz*, district attorney.

On behalf of the defendant-respondent, the cause was submitted on the brief of *Eric S. Erdmann* and *Roxanne F. Felizmena* of *Schellinger & Associates* of Brookfield.

Before Anderson, P.J., Brown and Nettesheim, JJ.

BROWN, J. Randall J. Gibas successfully argued before the trial court that charges of aiming and pointing a weapon should be dismissed with prejudice

against him because the State was guilty of outrageous governmental conduct. Essentially, Gibas argued that the defense of outrageous governmental conduct recognized in *United States v. Russell*, 411 U.S. 423 (1973), applies to this case because the Wisconsin Department of Justice (DOJ) intimidated several defense witnesses.[1] Because the facts of this case do not fit the paradigm of an outrageous governmental conduct defense as illustrated by case law, we reverse.

Gibas, a DOJ narcotics agent, was on stakeout with a female agent. He allegedly pointed his revolver at her while in the stakeout car and ordered her to remove her clothes. The female agent reported the incident to her superiors and Gibas was suspended.

The DOJ forwarded the information to the Calumet County Sheriff. The sheriff's department did its own investigation and, based upon this information and information supplied by the DOJ, the district attorney decided to charge Gibas with aiming and pointing a weapon.

Before trial, Gibas moved to dismiss on various grounds. All were denied save one. The trial court ruled in favor of Gibas' claim that the State was guilty of outrageous governmental "misconduct."

Gibas contended that: (1) the DOJ "directed" the district attorney to file a complaint—a claim denied by the district attorney; (2) following the issuance of the complaint, the DOJ superiors subtly threatened Gibas' fellow workers with reprisals if they either helped Gibas prepare his case or testified as character witnesses on his behalf; and (3) the DOJ and the district attorney were in continuous contact even after the complaint was issued, whereby the district attorney

[1] Following our certification of this issue, the Wisconsin Supreme Court declined to take jurisdiction over this appeal.

asked about possible *Whitty* evidence and other administrative matters pertaining to Gibas.

The trial court conducted an evidentiary hearing and then ruled that: (1) the district attorney made the *initial* charging decision in a "political vacuum, free of influence" and (2) during the course of prosecution, the DOJ had "an independent problem and agenda" concerning Gibas and its "continued involvement, with respect to submitting correspondence to the [district attorney's] office, conferring with prospective witnesses, handicapping or hindering prospective witnesses and exerting influence on the prosecution . . . subsequent to that independent charging document . . . unlawfully taints the prosecution." The trial court found a due process violation and dismissed the case with prejudice.

The issue in this case requires us to examine the defense of outrageous governmental conduct as set forth in *United States v. Russell*, 411 U.S. 423 (1973). In dictum, the Court stated that it "may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.* at 431-32. The Court further stated that the conduct must violate that " 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." *Id.* at 432 (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)). However, to date, this defense has never been applied successfully in a case before the United States Supreme Court.

In Wisconsin, our supreme court has never considered the validity of the defense of outrageous governmental conduct. However, the court of appeals

of Wisconsin has twice recognized the existence of the defense. In *State v. Steadman*, 152 Wis. 2d 293, 448 N.W.2d 267 (Ct. App. 1989), the court stated that a due process violation could arise if the government was so enmeshed in a criminal activity that the prosecution of the defendant would be repugnant to the American criminal justice system. *Id.* at 301, 448 N.W.2d at 271. The court appeared to require that the government instigate a crime in order for the defense to be successful. *Id.* Additionally, the court stated that the outrageous conduct must violate a specific constitutional right of the defendant. *Id.* at 302, 448 N.W.2d at 271. Finally, the court stated that the question of whether the government violated due process by its conduct was a legal question. *Id.* at 300, 448 N.W.2d at 271.

[1, 2]

The court in *State v. Hyndman*, 170 Wis. 2d 198, 488 N.W.2d 111 (Ct. App. 1992), reaffirmed its decision in *Steadman* by stating that the question of whether the defense applied to a given situation was a determination of constitutional fact. *Hyndman*, 170 Wis. 2d at 207-08, 488 N.W.2d at 115. The court in *Hyndman* stated that the appellate court was to review the decision of the trial court, without deference to its determination. *Id.* Therefore, in Wisconsin, it appears that: (1) the standard of review for the defense is de novo, (2) the defendant must assert that the State violated a specific constitutional right, and (3) the government's conduct must be so enmeshed in a criminal activity that prosecution of the defendant would be repugnant to the American criminal justice system.

There have been only two cases at the federal level where the defendant has successfully used the defense of outrageous governmental conduct. Both of these

cases support the proposition that the government's conduct must be enmeshed in criminal activity in order for the defense to apply. In *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971), the court reversed the defendants' convictions on charges involving possession of unregistered distilling apparatus, sale without stamp of distilled spirits, and conspiracy. The court implicitly[2] found that the defense of outrageous governmental conduct applied to the defendants because the government involved itself so directly and continuously over a long period of time in the creation and maintenance of criminal operations. *Id.* at 787.

In *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), the court reversed a defendant's conviction on charges stemming from the manufacture of "speed" because the conduct of the government violated "fundamental fairness." *Id.* at 381-82. The court reasoned that the government's conduct was outrageous because the Drug Enforcement Administration had generated the new crime by the defendant merely for the sake of pressing criminal charges against him. *Id.* Therefore, the defense of outrageous governmental conduct has only been successful at the federal level when the government was enmeshed in criminal activity.

[2] The defense of outrageous governmental conduct is different from entrapment. A defense of entrapment requires that the defendant not be predisposed to commit the crime in question. *Greene v. United States*, 454 F.2d 783, 786 (9th Cir. 1971). However, the disposition of the defendant is irrelevant under the defense of outrageous governmental conduct. The conduct of the government and not that of the defendant is the issue. The court in *Greene* implicitly recognized the defense of outrageous governmental conduct because it stated that the defendants had a predisposition to commit the crime in question, and therefore, entrapment was not available. *Id.*

[3]

Although Gibas has alleged a specific violation of his due process rights, his defense fails because the State's conduct here was not enmeshed in criminal activity. The trial court found a violation of due process because the DOJ: (1) submitted correspondence to the district attorney's office, (2) conferred with prospective witnesses, (3) handicapped or hindered prospective witnesses, and (4) exerted influence on the prosecution of the case. None of these reasons involved the government in criminal operations.

The crux of Gibas' defense was the alleged "intimidation" of prospective defense witnesses. A prospective defense witness at the DOJ was cautioned not to get involved in testifying for Gibas because "management [at the DOJ] has long memories." Another prospective defense witness was reprimanded for assisting Gibas during company time. Additionally, another prospective defense witness indicated that he felt intimidated by a DOJ employee. Although these actions by the DOJ are troubling, they certainly do not enmesh the State in criminal activity. The State did not create nor was it involved in the incident which led to the charges against Gibas. Thus, Gibas does not meet the requirement set out in *Steadman*, nor are the facts of his case similar to those of *Greene* and *Twigg*, the only cases where the defense of outrageous governmental conduct has been successfully applied.[3]

[3] Another panel of this court released *State v. Albrecht*, 184 Wis. 2d —, — N.W.2d — (Ct. App. 1994), on the day before this decision was released. That case also concerns a claim of outrageous governmental conduct. The rationale expressed in that case does not conflict with this decision, but rather compliments it.

[4, 5]

We do not imply here that a defendant has no recourse when the government intimidates witnesses to the point that the defendant's right to present a defense is compromised. The United States Supreme Court has recognized that if the government arbitrarily prevents a defendant from presenting a witness' testimony, the defendant's Sixth Amendment right to have compulsory process for obtaining witnesses in his or her favor may be violated. *See, e.g., Washington v. Texas*, 388 U.S. 14, 23 (1967). Additionally, suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, regardless of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *State v. Amundson*, 69 Wis. 2d 554, 577, 230 N.W.2d 775, 787 (1975); and *Bray v. Peyton*, 429 F.2d 500, 501 (4th Cir. 1970), illustrate these principles.

In *Bray*, four witnesses were going to testify on behalf of the defendant. However, before the trial, the prosecutor deliberately had one of the witnesses arrested on another charge. Two of the remaining witnesses were intimidated by this arrest and did not testify. *Bray*, 429 F.2d at 501. The court held that the prosecuting official obstructed the defendant's offer of exculpating proof and it was inherently prejudicial, violating the defendant's due process. *Id.* The court ordered a new trial for the defendant. *Id.* at 502.

We acknowledge that although Gibas has never raised a *Bray*-type argument either in the trial court or this court, we may affirm for reasons other than those announced by the trial court. *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679, 687 (Ct. App. 1985). Still, there are two reasons why we decline to use *Bray* here.

First, there has been no showing by Gibas that any prospective defense witnesses would have been prevented from testifying at trial. The fact that his prospective witnesses testified at the pretrial motion hearing indicates that any "intimidation" by the DOJ was unsuccessful and that the prospective witnesses would have been available to testify at trial. Therefore, the tactics used by the DOJ have not prejudiced Gibas—at least up to this point. Second, the remedy in *Bray* was a new trial, not dismissal of the charges with prejudice. Gibas has not yet had his trial. We will not use *Bray* to affirm the trial court.

[6]

We conclude that the defense of outrageous governmental conduct should not apply in Gibas' case because the government has not enmeshed itself in criminal activity. Additionally, although the DOJ's conduct was not commendable, it did not rise to the level that "shocks our conscience." Finally, Gibas' right to put on a defense was not violated because there was no prejudice established against him. We reverse and remand for further proceedings not inconsistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

APPENDIX "B"

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To: July 19, 1994

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You are hereby notified that the Court has entered the following order:

No. 93-1951-CR State v. Gibas L.C. #92CM1

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of

defendant-respondent-petitioner, Randall J. Gibas, and considered by the court.

IT IS ORDERED that the petition for review is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court